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In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF ALASKA, ALASKA ALCOHOLIC BEVERAGE CONTROL BOARD, CITY AND BOROUGH OF JUNEAU, AND ALASKA HOTEL & RESTAURANT EMPLOYEE TRUST FUNDS

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, by requiring state liquor licensees to pay all outstanding state and local taxes as a condition for approval of any transfer of the license, the State of Alaska may obtain priority in the distribution of the proceeds of the sale of the license over a perfected federal tax lien.

2. Whether the sale by the Internal Revenue Service of the taxpayers' interest in a liquor license to which a federal tax lien has attached must be rescinded because state and local tax claims have not been paid in full.

PARTIES TO THE PROCEEDINGS

In addition to the parties named in the caption, Alaska Distributors and Odom Corporation were parties to the proceedings in the courts below.

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No.

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STATE OF ALASKA, ALASKA ALCOHOLIC BEVERAGE CONTROL BOARD, CITY AND BOROUGH OF JUNEAU, AND ALASKA HOTEL & RESTAURANT EMPLOYEE TRUST FUNDS

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-6a) is unpublished, but the decision is noted at 8 F.3d 33 (Table). The opinions of the district court (App., *infra*, 8a-9a, 10a-23a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1993. The petition for rehearing was denied on December 16, 1993 (App., *infra*, 7a).

A petition for a writ of certiorari (No. 93-1564) was filed on March 14, 1994, and was received by the United States on March 22, 1994. Jurisdiction for this cross-petition is invoked under 28 U.S.C. 1254(1) and Rule 12.3 of the Rules of this Court.

STATUTORY PROVISIONS INVOLVED

1. Alaska Stat. § 04.11.360 (1993), as enacted by 1980 Alaska Sess. Laws, ch. 131, § 2, provides, in relevant part:

> An application requesting approval of a transfer of a license to another person under this title shall be denied if
>
> (1) the board finds, after review of all relevant information, that transfer of a license to another person would not be in the best interests of the public;
>
> (2) the application has not been completed in accordance with AS 04.11.280;
>
> (3) the application contains false statements of material fact;
>
> (4) the transferor has not paid all debts or taxes arising from the conduct of the business licensed under this title unless
>
> (A) the transferor gives security for the payment of the debts or taxes satisfactory to the creditor or taxing authority; or
>
> (B) the transfer is pursuant to a promise given as collateral by the transferor to the transferee in the course of an earlier transfer of the license under which promise the transferor is obliged to transfer the license back to the transferee in the event of default in payment for property conveyed as part of the earlier transfer of the license;
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> * * * * *

2. 26 U.S.C. 6321 provides:

> If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

3. 26 U.S.C. 6323(a) provides, in relevant part:

> The lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof * * * has been filed by the Secretary.

4. 26 U.S.C. 6331 provides, in relevant part:

> (a) If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person[.] * * *
>
> (b) * * * In any case in which the Secretary may levy upon property or rights to property, he may seize and sell such property or rights to property (whether real or personal, tangible or intangible).
>
> * * * * * *

STATEMENT

This case involves the efforts of the United States to satisfy an unpaid federal tax obligation through the seizure and sale of an Alaska liquor license.

1. Marcelo and Nancy Quinto operated a bar in Juneau, Alaska, known as the "Office Lounge," for which they held an Alaska liquor license. In 1985 and 1986, the Quintos became delinquent in the payment of taxes arising from the operation of the lounge. In July 1986, the City and Borough of Juneau recorded a notice of tax lien against the Quintos in the amount of $24,854. In September 1986, the Internal Revenue Service made assessments against the Quintos in the amount of $14,390 for unpaid federal employment taxes. Pursuant to Section 6321 of the Internal Revenue Code, a federal tax lien arose at that time against all of the Quintos' "property and rights to property, whether real or personal" (26 U.S.C. 6321). When the assessments went unpaid, notice of the federal tax lien was duly filed in the Juneau Recording District on September 30, 1986. On the same day, the Internal Revenue Service levied upon the Quintos' property pursuant to 26 U.S.C. 6331(a), seizing, among other items, the Quintos' liquor license (App., *infra*, 11a-12a).

Pursuant to 26 U.S.C. 6331(b), the IRS conducted a public sale of the liquor license by sealed bid in November 1986. The IRS was the only bidder at the sale, purchasing the license for $14,827. The proceeds of the sale were applied to satisfy the Quintos' federal tax liability (App., *infra*, 12a). Title to the license thus vested in the United States by operation of law. 26 U.S.C. 6339(a)(2).

In September 1987, the IRS resold the license at a public auction. The successful bidders were John W. Henry and Ira W. Rosen (on behalf of Wayne Entertainment, Inc.), who paid $20,500 to the United States.[1] A certificate of sale was executed by the IRS, transferring "all right, title, and interest of the United States" in the license to Henry and Rosen (App., *infra*, 3a, 12a).

In January 1988, the IRS applied to the Alaska Alcoholic Beverage Control Board (ABC) to transfer the license to Wayne Entertainment. Several creditors of the Office Lounge, including the State of Alaska and the City and Borough of Juneau, filed objections to the transfer under Alaska Stat. § 04.11.360(4) (1993), which requires "all debts or taxes arising from the conduct of the [licensed]

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[1] Juneau asserted that it had been informed by the United States that the City's prior-filed lien of approximately $35,000 was to be paid by the purchaser of the license (App., *infra*, 13a). The district court mistakenly assumed that this payment by the purchaser was to be from the cash proceeds ($20,500) received by the United States (*id.* at 22a n.7). Instead, the title conveyed to Henry and Rosen by the United States remained subject to the City's prior-filed lien under 26 U.S.C. 6339(a)(2) and therefore remained subject to state lien collection procedures. See, *e.g.*, *United States* v. *Sage*, 566 F.2d 1114, 1114-1115 (9th Cir. 1977) (a tax sale pursuant to 26 U.S.C. 6335 "has no effect whatsoever upon the interest of senior mortgagees"); *National Bank & Trust Co.* v. *United States*, 589 F.2d 1298, 1302-1304 (7th Cir. 1978) (federal tax sale does not take or destroy a senior lien). In reaching their decisions in this case, neither the district court nor the court of appeals relied on the City's contention that it was to be paid from the proceeds of the federal tax sale. Instead, the courts below ordered that sale to be rescinded (App., *infra*, 6a, 9a).

business" to be paid before the State will approve any transfer of the license (*ibid.*). In April 1988, the Alaska ABC denied the application to transfer the license to Wayne Entertainment. The agency cited three reasons for its action: (i) the Quintos filed for bankruptcy in December 1986 and the automatic stay resulting from that filing was still in effect; (ii) a previous owner had petitioned to have the license transferred back to her pursuant to Alaska Stat. § 04.11.360(4)(B) (1993); and (iii) the objections filed by the State of Alaska, the City and Borough of Juneau, and other creditors under Alaska Stat. § 04.11.360(4) (1993) remained unsatisfied (App., *infra*, 3a-4a, 13a).

2. In November 1989, the United States commenced this action in federal district court seeking (i) a declaration that it was entitled under federal law to transfer the license to Wayne Entertainment, Inc. and (ii) an injunction compelling the ABC to approve the transfer of the license. The district court entered summary judgment against the United States (App., *infra*, 10a-23a).

The court held that, under Alaska Stat. § 04.11.360 (4) (1993), the United States could "acquire or transfer its interest in the license only upon satisfaction of creditors' claims" (App., *infra*, 18a). Upon a motion for reconsideration by the State of Alaska, the court further ordered the sale of the license by the United States to Wayne Entertainment to be rescinded (*id.* at 9a), stating, without elaboration, that "no legal foreclosure action has taken place" (*ibid.*). In the same ruling, the court vacated the portion of its prior order that had "decided the priorities among

various creditors to the proceeds of the sale of the liquor license" by the United States (*ibid.*).[2]

3. The court of appeals affirmed (App., *infra*, 1a-6a). In a brief, unpublished opinion, the court relied on its prior decision in *United States* v. *Battley (In re Kimura)*, 969 F.2d 806 (9th Cir. 1992), and on the decision entered by the same panel one week earlier in *United States* v. *Stone*, 6 F.3d 581 (9th Cir. 1993), for the proposition that Alaska may " 'reserve to itself payment of delinquent state or local taxes' from the proceeds of a liquor license transfer" (App., *infra*, 5a, quoting *United States* v. *Battley (In re Kimura)*, 969 F.2d at 812). The court concluded that the federal lien attached only to the " 'residual' value of the property after such state and local taxes are paid" (App., *infra*, 5a, quoting *United States* v. *Battley (In re Kimura)*, 969 F.2d at 812). The court therefore held that "when the IRS acquired the license by sealed bid at the first tax sale, whatever it acquired was subject to the State of Alaska's and Juneau's property interests in the taxes owed them" (App., *infra*, 5a-6a). Concluding that the "State of Alaska and City and Borough of Juneau are entitled to assert their interests in the license through the state statutory scheme," the court held that the sale conducted by the United States "was properly rescinded" (*id.* at 6a).

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[2] The court had earlier ruled that the lien filed by the City and Borough of Juneau was prior in time to the lien of the United States and was therefore entitled to be paid first from the proceeds of the federal tax sale (App., *infra*, 22a). But see note 1, *supra*. The court had further ruled that the federal lien was second in time and that the federal claim was therefore to be paid in advance of the claims of the trade creditors and others who objected to the sale under the Alaska statute (App., *infra*, 22a).

REASONS FOR GRANTING THE CROSS-PETITION

1. Under Alaska law, "all debts or taxes arising from the conduct of the business" must be paid before the State will approve the transfer of a liquor license. Alaska Stat. § 04.11.360(4) (1993). The principal question addressed in this case is identical to the question presented in *United States* v. *Stone*, 6 F.3d 581 (9th Cir. 1993). In *Stone*, as here (App., *infra*, 5a), the court of appeals held that state and local tax claims have priority over a preexisting federal tax lien under Alaska law because "the State may validly reserve a property interest in itself to be paid before a state-created liquor license may be transferred" (6 F.3d at 584).[3] The court further held in *Stone*, however, that this same rationale does not permit the State to "reserve" a property interest that would also afford trade creditors with a priority over the federal lien (*ibid.*). See also *United States* v. *Battley (In re Kimura)*, 969 F.2d at 812.

The Ninth Circuit's decisions in *In re Kimura*, *Stone* and in this case conflict with the Sixth Circuit's decision in *Bavely* v. *United States*, 911 F.2d 1168 (1990), cert. denied *sub nom. Ohio Dep't of Taxation* v. *IRS*, 111 S. Ct. 2815 (1991).[4] In rejecting Ohio's

[3] The United States has not sought further review of the *Stone* decision because, even under the priority afforded to the federal tax lien by the court of appeals in that case, the claim of the United States will be fully paid from the sale proceeds under the order of distribution entered by the bankruptcy court in related proceedings.

[4] In *Bavely*, the Sixth Circuit noted that its decision was inconsistent with the decision of the Ninth Circuit in *United States* v. *California*, 281 F.2d 726 (1960). See 911 F.2d at 1177. The Ninth Circuit subsequently relied on *California* in reaching its decision in *Stone* (6 F.3d at 583). The United States opposed the State's petition for a writ of certiorari in

claim of priority under a similar state statute (Ohio Rev. Code Ann. § 4303.26(B)(1) (Anderson 1989)), the court concluded in *Bavely* that (911 F.2d at 1173):

> [t]he question is not whether the state has reserved an interest in the license or placed a limitation on the debtor's interest in the license. Rather, the question to be answered is whether the state's debt collection method is a property interest that can be asserted in a bankruptcy proceeding to collect debts owed to the state ahead of payment of a perfected federal tax lien.

Because at least ten States have statutes similar to those of Alaska and Ohio, the conflict created by the decision in this case is one of recurring national importance.[5]

Bavely, however, because the Ninth Circuit decision in *California* was entered "21 days after this Court's decision in [*Aquilino* v. *United States*, 363 U.S. 509 (1960)], with no indication that the court was aware either of the *Aquilino* decision or even of the controversy that gave rise to that decision" (U.S. Br. in Opp. No. 90-772, at 7). The United States suggested at that time that, "[i]n view of the inconsistency between the decision in *United States* v. *California* and this Court's decision in *Aquilino*, it is doubtful whether the Ninth Circuit would, in light of *Aquilino*, follow its earlier decision when a competing federal tax lien was involved" (*id.* at 8). "Until the Ninth Circuit, while acknowledging *Aquilino*, follows *United States* v. *California* and subordinates a perfected federal tax lien, we believe that there is no conflict with the decision of the Sixth Circuit in [*Bavely*]" (*ibid.*). In *Stone* and in the present case, the Ninth Circuit has established the conflict that was thought, or hoped, to be lacking when *Bavely* was presented to the Court. See 6 F.3d at 583.

[5] See Ariz. Rev. Stat. Ann. § 4-210(A)(5) (1989 & Supp. 1993); Cal. Bus. & Prof. Code § 24049 (West 1985); Haw. Rev. Stat. § 281-45(3) (1992); Md. Ann. Code art. 2B,

a. Section 6321 of the Internal Revenue Code establishes a lien in favor of the United States for the collection of taxes in all "property and rights to property, whether real or personal, belonging to [the taxpayer]" (26 U.S.C. 6321). The priority of this lien with respect to competing claims to the taxpayer's property is "always a federal question." *United States* v. *Acri*, 348 U.S. 211, 213 (1955). See also *Aquilino* v. *United States*, 363 U.S. 509, 513-514 (1960) ("once the tax lien has attached to the taxpayer's state-created interests," federal law "determines the priority of competing liens asserted against the taxpayer's 'property' or 'rights to property' ").[6]

In determining the priority of the federal tax lien against competing secured claims, this Court has looked to the common law principle that "the first in time is the first in right." See, *e.g.*, *United States* v.

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§ 74(a)(1) (1993); N.M. Stat. Ann. § 7-1-82(A) (1993); Pa. Stat. Ann. tit. 47, § 4-477(d)(3) (Purdon Supp. 1994); R.I. Gen. Laws § 3-5-19 (1987); S.D. Codified Laws Ann. § 35-2-7 (1992).

[6] The creation of the federal tax lien and the establishment of its priority are a proper exercise of Congress's power under Article I, § 8, Cl. 1 of the Constitution "[t]o lay and collect Taxes." See *Michigan* v. *United States*, 317 U.S. 338, 340 (1943); *United States* v. *Snyder*, 149 U.S. 210, 214 (1893). In the landmark case of *M'Culloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 407, 425 (1819), this Court recognized that, under the Supremacy Clause, "the great power[] to lay and collect taxes" "restrain[s] * * * a State from such other exercise of this [taxing] power, as is in its nature incompatible with, and repugnant to, the constitutional laws of the Union." See also *Free* v. *Bland*, 369 U.S. 663, 666 (1962) ("any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield").

McDermott, 113 S. Ct. 1526, 1528 (1993). The lien of the United States was perfected by its filing (see 26 U.S.C. 6323(a)) *before* the claims of the competing state and local governments (other than the City of Juneau) and trade creditors in this case were filed in compliance with state procedures.[7] The lien of the United States is thus "first in time" and has priority in the "property and rights to property" of the taxpayers—including their interest in the state-granted license. See 26 U.S.C. 6323(a); *United States* v. *McDermott*, 113 S. Ct. at 1528; *United States* v. *City of New Britain*, 347 U.S. 81, 85 (1954). The court of appeals recognized in *Stone* and *In re Kimura* that this well-established principle forecloses the claims asserted by the trade creditors in those cases. See 6 F.3d at 584; 969 F.2d at 813.[8]

The court concluded, however, that the position of the state and local governments is different. Because a state-granted license is a creature of state law, the court reasoned that the State may "reserve" the right to have state and local tax liabilities satisfied first from the proceeds of any sale of the license (App., *infra*, 5a).[9] Under the reasoning of the court of ap-

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[7] We do not dispute that the claim of the City of Juneau, which was perfected by the timely filing of a state tax lien, is prior in time to that of the United States. See notes 1 & 2, *supra*. It is our position that the federal tax lien has priority over all *other* state and local government and trade creditor claimants.

[8] In the present case, the court of appeals concluded that it was unnecessary to divide the sales proceeds among the various claimants because it instead ordered the sale to be "rescinded" (App., *infra*, 6a).

[9] The Alaska statute, of course, does not purport to "reserve" any specific property interest for the State. It merely

peals, the State may, at the time of granting or establishing a property interest, carve out for itself a future right to payment of state and local tax claims that may thereafter arise. That reasoning, however, conflicts with this Court's consistent holding that, to defeat the federal lien, the competing claim must be first perfected by establishing "the identity of the lienor, the property subject to the lien, *and the amount of the lien*" (*United States* v. *City of New Britain*, 347 U.S. at 84; emphasis added). See also *United States* v. *McDermott*, 113 S. Ct. at 1528; *United States* v. *Pioneer American Ins. Co.*, 374 U.S. 84, 90 (1963) (rejecting a claim of priority because "the amount of the lien * * * was undetermined and indefinite when the federal tax liens in question were filed"). Because the claims of the state government remained "undetermined and indefinite" prior to the filing of its objection to the transfer under the State's law, and "[s]ince that occurred *after* filing of the federal tax lien, the state lien was not first in time" (*United States* v. *McDermott*, 113 S. Ct. at 1530).

Whether, as a matter of state law, the State has created a right that is superior to the right of *other* creditors of the licensee does not answer the question whether, as a matter of *federal* law, the State can create a right that is superior to the federal tax lien. As the Sixth Circuit concluded in *Bavely* v. *United States*, 911 F.2d at 1172, the mere fact that a liquor license is a creature of state law vests no power in the State to reserve a right for itself *as a creditor* that conflicts with federal law. "[C]ourts look to state law to determine what legal interests in prop-

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states that the claims of *all* creditors are to be paid before the license may be transferred. Alaska Stat. § 04.11.360(4) (1993).

erty a debtor or taxpayer has and to federal law to determine whether these state-created interests constitute property or rights to which a tax lien can attach." *Id.* at 1171. See *Butner* v. *United States*, 440 U.S. 48, 54 (1979); *Aquilino* v. *United States*, 363 U.S. at 513. Even if state law were to declare that a liquor license is not "property"—or that it is not subject to the claims of any creditor other than the State itself—that would not control application of the federal tax lien.[10] Any right, including a state-granted license, that "ha[s] beneficial value for its holder and could be transferred or sold" constitutes "property" to which the federal tax lien attaches under 26 U.S.C. 6321. *Bavely* v. *United States*, 911 F.2d at 1171. Accord *21 West Lancaster Corp.* v. *Main Line Restaurant, Inc.*, 790 F.2d 354, 358 (3d Cir. 1986) (state law determines the nature of the licensee's legal interests but does "not determine the characterization of these interests under federal tax law"). As the Ninth Circuit noted in *Crocker National Bank* v. *Trical Manufacturing Co.*, 523 F.2d 1037, 1039 n.2 (1975):

> [T]he scheme by which state law determines property rights and federal law determines priorities can conceivably lead to defeat of the federal priority scheme by formalistic redefinition of state law to divest the taxpayer of property

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[10] See *United States* v. *Rodgers*, 461 U.S. 677, 700-702 (1983) (state homestead exemption law does not preclude foreclosure and sale of home to satisfy federal tax lien); *United States* v. *Mitchell*, 403 U.S. 190, 203-204 (1971) (wife's renunciation under state law of community property rights did not insulate her from federal tax liability on community earnings); *United States* v. *Union Central Life Ins. Co.*, 368 U.S. 291, 293-295 (1961) (federal tax lien is not subject to state filing requirements).

> rights upon attachment of inchoate liens. * * * So long as the state recognizes some rights in relation to the property in the taxpayer, the Supremacy Clause enters to give the government whatever priorities Congress has deemed proper.

In *Bavely* v. *United States*, the Sixth Circuit concluded that the States may not, through the artifice of "reserving" a right under state law, defeat the priority of the federal lien established under federal law. 911 F.2d at 1176-1177. See also note 9, *supra*. In so ruling, the court acknowledged that its ruling conflicted with the Ninth Circuit's decision in *United States* v. *California*, 281 F.2d 726 (1960), which it "decline[d] to follow" (911 F.2d at 1177). Because the Ninth Circuit relied on *United States* v. *California* in reaching its contrary decision here (see note 4, *supra*), there is now a firm, acknowledged conflict among the circuits on the first question that this cross-petition presents.

b. That question is one of recurring national importance. In addition to Alaska and Ohio, at least eight other States have statutes that prohibit the transfer of liquor licenses when state or local taxes have not been paid. See note 5, *supra*. The conflict established by the decisions in *Stone* and this case thus creates broad uncertainty in the determination of creditors' rights and will produce repetitive and burdensome litigation.

Moreover, the decision in this case can be understood to permit the States to adopt similar priority payment schemes for all other types of state-granted licenses, from cable television franchises and commercial fishing licenses to licensed public utilities.[11]

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[11] The Ninth Circuit's analysis is expressly not limited to liquor licenses. See App., *infra*, 5a-6a. Instead, it applies by

The decision thus threatens a significant interference with the well-established priority scheme developed by Congress and enforced through decades of this Court's decisions.

2. The second question presented in this cross-petition was seemingly addressed as an afterthought in both of the courts below. That question is whether, pursuant to 26 U.S.C. 6331(b), the United States, having validly seized the interest owned by a defaulting taxpayer in a state liquor license, may then sell the taxpayer's interest in the license (however that interest may be characterized). By "rescind[ing]" the sale conducted by the United States in this case (App., *infra*, 6a, 9a), both of the courts below failed to consider or address the provisions of federal law that expressly authorize the Treasury to "seize and sell" all "property and rights to property" owned by a defaulting taxpayer that are not exempt from levy "under section 6334" of the Internal Revenue Code (see 26 U.S.C. 6331(a) and (b)). Section 6334 provides no exemption for state liquor licenses. 26 U.S.C. 6334. Since there is no doubt that the taxpayers' interest in the liquor license is an interest in "property" (see, *e.g.*, *United States* v. *Stone*, 6 F.3d at 583-584; *United States* v. *Battley (In re Kimura)*, 969 F.2d at 811), there should also be no doubt that the United States, having validly seized that interest, may then "sell" that interest pursuant to 26 U.S.C. 6331(b).

Although the cursory disposition of this question in the courts below is troubling, this issue was not squarely addressed in *In re Kimura*, *Stone* or *Bavely*,

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its terms to any state-granted license. See *ibid.*; *United States* v. *Stone*, 6 F.3d at 585.

all of which involved sales by bankruptcy courts rather than federal foreclosure actions. There is thus no direct conflict on this aspect of the decision in this case. If the Court accepts review in this case and reverses the court of appeals on the first question presented, a remand to the court of appeals would permit its plenary consideration of this remedial issue in light of the Court's determination of the parties' respective substantive rights. Cf. *Pierce* v. *Underwood*, 487 U.S. 552, 574 (1988).

CONCLUSION

If the petition for a writ of certiorari is granted in No. 93-1564, the cross-petition for a writ of certiorari should be granted under Rule 13.5 of the Rules of this Court on the first of the two questions presented.

Respectfully submitted.

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APRIL 1994

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-36247

D.C. No. CV-91-36247

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

STATE OF ALASKA; ALASKA ALCOHOLIC BEVERAGE CONTROL BOARD; CITY & BOROUGH OF JUNEAU; ALASKA DISTRIBUTORS; ODOM CORPORATION; ALASKA HOTEL & RESTAURANT EMPLOYEE TRUST FUNDS, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the District of Alaska

H. Russell Holland, District Judge, Presiding

Argued and Submitted August 3, 1993
Anchorage, Alaska

[Filed Sep. 30, 1993]

MEMORANDUM*

Before: SCHROEDER, FLETCHER and ALARCON, Circuit Judges.

The United States seeks to quiet title to an Alaska liquor license it purchased at a federal tax sale and seeks an injunction ordering the Alaska Alcoholic Beverage Control Board ("ABC") to transfer the license to the successful bidder at a later sale conducted by the IRS. The district court rescinded the sale, holding that the ABC could properly deny the transfer. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY

Marcelo and Nancy Quinto operated a bar in Juneau, Alaska known as the Office Lounge. The Quintos held an Alaska liquor license. In 1985 and 1986, the Quintos became delinquent in the payment of taxes arising from the operation of the Office Lounge, including federal and state employment taxes and sales and property taxes assessed by the City and Borough of Juneau. On July 28, 1986, Juneau recorded a notice of tax lien against the Quintos in the amount of $24,854.22. On September 29, 1986, the IRS assessed delinquent taxes against the Quintos totalling $14,389.94, thus creating a federal tax lien that attached to all of the Quintos' property. *See* 26 U.S.C. §§ 6321, 6322. The United States recorded its lien on September 30, 1986. On that same day, it levied upon

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

the Quintos' property, seizing, *inter alia*, the liquor license.

The IRS published notice that it would sell the liquor license by sealed bid on November 20, 1986. The IRS was the only bidder at the sale, purchasing the license for $14,827.43. The record reflects that the proceeds of the sale were applied (the amount of the IRS bid apparently was credited) to satisfy fully the Quintos' federal tax liability. The Quintos filed for bankruptcy in December 1986.

On September 30, 1987, after published notice, the IRS auctioned the license. The highest bid, from John W. Henry and Ira W. Rosen on behalf of Wayne Entertainment, Inc., was for $20,500. A certificate of sale was executed by the IRS, transferring "all right, title, and interest of the United States" in the license to Henry and Rosen. (Certified Record 32, Branman Decl. ex. I.)

In January 1988, the IRS applied to the ABC to transfer the license to Wayne Entertainment. Pursuant to Alaska Stat. § 04.11.470, several creditors of the Office Lounge, including the State of Alaska and the City and Borough of Juneau, filed objections to the transfer. Under the Alaska statutory scheme, the ABC will deny an application to transfer a liquor license if

> the transferor has not paid all debts or taxes arising from the conduct of the business licensed . . . unless
>
> (A) the transferor gives security for the payment of the debts or taxes satisfactory to the creditor or taxing authority; or
>
> (B) the transfer is pursuant to a promise given as collateral by the transferor to the transferee in

> the course of an earlier transfer of the license under which promise the transferor is obliged to transfer back to the transferee in the event of default in payment for property conveyed as part of the earlier transfer of the license[.]

Alaska Stat. § 04.11.360(4).

On April 14, 1988, the ABC denied the IRS's application to transfer ownership of the license, citing as its reasons: 1) the Quintos' bankruptcy; 2) a previous owner's petition to have the license transferred back to herself pursuant to Alaska Stat. 04.11.360(4)(B); and 3) the objections, or "holds," filed by the State of Alaska, the City and Borough of Juneau, and other unsatisfied creditors.

On November 27, 1989, the United States filed this suit seeking a determination that it has "an interest sufficient to transfer the license to Wayne Entertainment, Inc." and that none of the defendants other than the State of Alaska may assert any right, title or interest in the license. The United States also seeks an injunction requiring the ABC to transfer the liquor license to Wayne Entertainment.

On June 14, 1991, the district court granted summary judgment in favor or the City and Borough of Juneau, denying the other parties' motions for summary judgment. The court held that the restriction on the transfer of liquor licenses embodied in Alaska Stat. § 04.11.360(4) was a proper exercise of state power, and that the IRS could "acquire or transfer its interest in the license only upon satisfaction of creditors' claims." (Excerpts of Record at 18.).[1] Upon a

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[1] The court also ruled on the priority of the claims. However, it subsequently vacated this portion of its opinion.

motion for reconsideration by the State of Alaska, the court further ordered that the sale of the license to Wayne Entertainment be rescinded.

This appeal by the United States followed.

DISCUSSION

The United States maintains that it is entitled, as a matter of federal law, to sell the liquor license to Wayne Entertainment in order to "satisfy the federal tax lien." [2]

In *United States v. Battley (In re Kimura)*, 969 F.2d 806 (9th Cir. 1992), another case involving Alaska's liquor license transfer provisions, we held that, notwithstanding the presence of a federal tax lien, Alaska was entitled to "reserve to itself payment of delinquent state or local taxes" from the proceeds of a liquor license transfer. *Id.* at 812; *accord United States v. Stone (In re Stone)*, No. 91-36338, slip op. 10349, 10355 (9th Cir. Sept. 22, 1993). In so holding, we noted that the interest in property to which a federal lien attaches is the "residual" value of the property after such state and local taxes are paid. *Kimura*, 969 F.2d at 812; *Stone*, slip op. at 10355. Thus, in the instant case, when the IRS acquired the license by sealed bid at the first tax sale, whatever it acquired

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[2] One problem with appellant's position is that the United States no longer has an interest in the license other than as its owner. When the IRS purchased the license and applied the sale price to satisfy the Quintos' tax liability, the federal tax lien was extinguished. 26 U.S.C. § 6322 ("Unless another date is specifically fixed by law, the [tax] lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed . . . is satisfied or becomes unenforceable by reason of lapse of time.")

was subject to the State of Alaska's and Juneau's property interests in the taxes owed them.

Under *Kimura*, the State of Alaska and City and Borough of Juneau are entitled to assert their interests in the license through the state statutory scheme.[3] The sale was properly rescinded.

AFFIRMED.

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[3] The district court did not have the benefit of our recent decision in *Kimura* when it ruled on the summary judgment motions in this case. In upholding Juneau's right to enforce its interest in the license, we note that the district court's rationale for its grant of summary judgment to Juneau conflicts to some extent with our holding in *Kimura* that Alaska may not validly reserve to third-party trade creditors the right to be paid ahead of a federal tax lien. 969 F.2d at 813.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91-36247

D.C. No. A89-475 CIV

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

STATE OF ALASKA; ALASKA ALCOHOLIC BEVERAGE CONTROL BOARD; CITY & BOROUGH OF JUNEAU; ALASKA DISTRIBUTORS; ODOM CORPORATION; ALASKA HOTEL & RESTAURANT EMPLOYEE TRUST FUNDS, DEFENDANTS-APPELLEES

[Filed Dec. 16, 1993]

ORDER

Before: SCHROEDER, FLETCHER and ALARCON, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A89-475 Civil

UNITED STATES OF AMERICA, PLAINTIFF

vs.

STATE OF ALASKA, MADELINE GORDON, CITY AND BOROUGH OF JUNEAU, C.J. ENTERPRISES, CAPITAL CITY WEEKLY, ALASKA DISTRIBUTORS, KINY, ODOM CORPORATION, CAPITAL DEVELOPMENT, MARCELLO QUINTO, NANCY QUINTO, AND ALASKA HOTEL AND RESTAURANT EMPLOYEES TRUST FUNDS, DEFENDANTS

[Filed Sep. 19, 1991]

ORDER

(On Various Motions for Reconsideration)

On June 14, 1991, this court signed an order in the above captioned case which denied the United States' motion for summary judgment and granted the defendants' cross-motions for summary judgment. On June 27, 1991, the United States moved for reconsideration. On June 28, 1991, the State of Alaska moved for reconsideration/clarification and requested

that the court, rather than deciding the priorities among the creditors to the proceeds of the sale of the liquor license, simply rescind the sale on the grounds that the foreclosure was illegal. The City and Borough of Juneau and Alaska Distributors Company moved for reconsideration on July 3, 1991, and July 19, 1991, respectively.

The court hereby grants the State of Alaska's motion for reconsideration/clarification. The sale of the liquor license by the IRS is hereby rescinded. The court finds that no legal foreclosure action has taken place and the court concludes, based on the reasoning in *United States v. State of California*, 281 F.2d 726 (9th Cir. 1960), and related cases,[1] that the federal government cannot claim or seize any greater interest in the license than that created by the State of Alaska. That part of this court's order of June 14, 1991, which decided the priorities among various creditors to the proceeds of the sale of the liquor license is hereby vacated *sua sponte*.

DATED at Anchorage, Alaska, this 18th day of September, 1991.

/s/ Illegible
United States District Judge

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[1] *See United States v. Rodgers*, 461 U.S. 688 (1983); *United States v. Bess*, 357 U.S. 51 (1957); *Matter of Professional Bar Co., Inc.*, 537 F.2d 339 (1976).

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A89-475 Civil

UNITED STATES OF AMERICA, PLAINTIFF

vs.

STATE OF ALASKA, ET AL., DEFENDANTS

[Filed Jun. 14, 1991]

ORDER

(Defendants Granted Summary Judgment)

The court now has before it cross-motions for summary judgment filed by plaintiff, the United States of America, on behalf of the Internal Revenue Service ("IRS") and by the following defendants: the State of Alaska, the City and Borough of Juneau, Odom Corporation, Alaska Distributors, and the Alaska Hotel and Restaurant Employees Trust Funds (herein collectively "the defendants"). Oral argument has not been requested and is deemed unnecessary for disposition of these motions. For the reasons set forth below, the court hereby denies the

motion of the IRS for summary judgment and grants defendants' motion.[1]

This suit arises from the refusal of the State of Alaska Alcoholic Beverage Control Board ("ABC Board") to transfer a liquor license. The liquor license in question was originally issued by the ABC Board to Raymond and Madeline Gordon in 1978. In June of 1987, the ABC Board granted the Gordons permission to transfer the license to Marcello and Nancy Quinto. As part of the transfer, the parties agreed that the license would be assigned back to the Gordons in the event of a default on the note. The Quintos began operating their establishment under the name of "Marcello's" and, with the approval of the ABC Board, later changed the location and the name of the establishment to the "Office Lounge."

In 1985 and 1986 the Office Lounge became delinquent in the payment of sales and personal property taxes to the City and Borough of Juneau. On July 28, 1986, Juneau recorded a notice of tax lien against the Quintos in the amount of $24,854.22 for delinquent sales tax returns. The notice was recorded in the Juneau Recording District. Thereafter, a notice of lien was filed with the ABC Board on August 18, 1986, by Capital Development Partnership for delinquent rents in the amount of $35,264.23.

On September 29, 1986, and December 8, 1986, the Quintos and the Office Lounge were assessed by the IRS for failure to pay federal employment taxes for the 1985 and 1986 tax years. On September 30,

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[1] On April 30, 1990, an order of default was entered against defendants Madeline Gordon, C.J. Enterprises, Capitol City Weekly, KINY, Capital Development, and Marcello Quinto and Nancy Quinto.

1986, a notice of federal tax lien in the amount of $14,389.94 was filed against the Quintos in the Juneau Recording District. That day, the IRS seized the Quintos' business premises, $3,108.75 in cash, some personal property, and the liquor license for the Office Lounge. It is not disputed that the IRS sent proper notice and demand for payment to the Quintos.

By letter dated October 1, 1986, the IRS notified the ABC Board of its lien on the Quintos' liquor license. On October 22, 1986, a notice was published in the *Juneau Empire* newspaper and was posted at the State Office Building and a local mall, stating that the IRS would sell the Quintos' license pursuant to a sealed bid sale on November 20, 1986. At the sale the IRS itself purchased the liquor license for $14,827.43; no other bids were submitted at the sale.

Prior to the sale, Madeline Gordon applied to the ABC Board for an "Involuntary Transfer of License Holder" pursuant to her preexisting agreement with the Quintos and AS 04.11.360(4)(b). Thereafter, on December 23, 1986, the Quintos filed for Chapter 11 bankruptcy. At the ABC Board meeting of February 4 and 5, 1987, Madeline Gordon's application for transfer of the license was denied due to a hold on the license arising from the bankruptcy proceedings.

In September of 1987, the IRS placed an ad in the *Juneau Empire* notifying the public that the Quintos' license would be sold by the IRS at auction. The auction was held on September 30, 1987, with the highest bid being $20,500.00 submitted by Ira Rosen and John Henry on behalf of "Wayne Enterprises/Entertainment."[2] On October 26, 1987, Madeline

[2] There is a conflict in the pleadings as to the proper name of the Rosen/Henry entity. For purposes of consistency, the court will refer to the entity as "Wayne."

Gordon protested the transfer of the license by the IRS at public auction.[3] Additionally, by letter dated October 26, 1987, the bankruptcy trustee protested the transfer of the license from the Quintos to the IRS.

On February 27, 1987, the IRS applied to the ABC Board for an annual renewal of the liquor license. Juneau waived its right to protest the renewal of the license based upon assurances by the IRS that proceeds from the sale of the liquor license would be applied towards the outstanding debt of approximately $35,399.06 owed to Juneau by the Office Lounge.

On January 6, 1988, the IRS applied to the ABC Board for a transfer of the liquor license to Wayne. Protests against the transfer were made by the defendants on the basis that there were unsatisfied creditors pursuant to AS 04.11.360(4)(A). On April 13 and 14, the ABC Board denied the IRS's application to transfer the license. On May 12, 1988, the IRS received a letter from the ABC Board which denied the requested transfer because of the various creditor claims, the Quintos' bankruptcy proceedings, and because Madeline Gordon might possess standing to transfer the license back to herself.

The court now has before it competing creditors' claims against the proceeds of the sale of the Quintos' license. Both the United States and the defendants claim priority against the proceeds to satisfy debts owed.

The United States claims that the action of the ABC Board in denying the transfer of the liquor

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[3] Madeline Gordon was divorced from Raymond Gordon in 1984. Raymond released his interest in the Quintos' debt to his former spouse.

license warrants injunctive relief. It maintains that the Board's refusal improperly interferes with the United States' ability to transfer the delinquent taxpayers' right, title, and interest in the liquor license and to obtain the proceeds thereof to satisfy delinquent taxes. If relief is denied, the United States argues, it will suffer irreparable injury in that it will not be in a position to collect the taxes owed. The United States has therefore brought this action, requesting that this court determine the title and interest to the liquor license and for injunctive relief compelling the State of Alaska (the ABC Board) to transfer the license to Wayne or any other purchaser who qualifies under Alaska law. Lastly, it is requested that all other defendants (save the State of Alaska) be enjoined from claiming any right or interest in the Quintos' liquor license.

Defendants have filed cross-motions for summary judgment. The principal argument raised is aimed at whether the IRS's claim of priority against the liquor license is sufficient to warrant that the ABC Board transfer the license to Wayne. Defendants assert that an Alaska liquor license is a state interest, created pursuant to the twenty-first amendment of the United States Constitution. It is urged that this grant of authority prohibits the transfer of the license to Wayne until creditors' claims against the license have been satisfied.

Summary judgment is proper if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure. Entry of summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the

existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). On motions for summary judgment, the court views the evidence and the inferences therefrom in the light most favorable to the non-moving party. *T.W. Electrical Services, Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626 (9th Cir. 1987). There are no factual disputes in the matter before the court; summary judgment is therefore appropriate.[4]

The principal dispute before the court concerns a conflict between the IRS's authority to lay and collect taxes under article I, section 8, of the United States Constitution with the provisions found at Title 4 of the Alaska Statutes. The IRS urges the court to find that Title 4 improperly interferes with the supremacy of federal law in the area of tax collection. The court does not agree.

The twenty-first amendment grants authority to the states to prohibit the transportation, sale, manufacture, or possession of intoxicating liquors. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939). Title 4 was promulgated by the Alaska Legislature pursuant to the power delegated to it by the twenty-first amendment. It is well established that states may also adopt measures reasonably appropriate to achieve the objectives granted them and exercise full police authority in respect to them. *Id.*

The Alaska Legislature has given the ABC Board full power, authority, and control to regulate the sale

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[4] Given that the court has ruled in favor of the defendants, the court has interpreted the evidence and the inferences therefrom in the light most favorable to plaintiff.

and possession of intoxicating liquors. *Boehl v. Sabre Jet Room, Inc.*, 349 P.2d 585, 586 (Alaska 1960). As part of the mechanism designed to ensure the regulation of intoxicating liquors, the legislature delegated to the ABC Board the power to create liquor licenses and place conditions on their transfer. *Id.* at 587; *see* AS 04.11.010 and AS 04.11.360. The IRS takes exception to the actions of the ABC Board under AS 04.11.360(4) which prohibits the transfer of a liquor license pending the satisfaction of creditors' claims against the license.

The statute provides in relevant part:

> *Sec. 04.11.360. Denial of transfer of a license to another person.* An application requesting approval of a transfer of a license to another person under this title shall be denied if
>
> . . . .
>
> (4) the transferor has not paid all debts or taxes arising from the conduct of the business licensed under this title unless
>
> (A) the transferor gives security for the payment of the debts or taxes satisfactory to the creditor or taxing authority; or
>
> (B) the transfer is pursuant to a promise given as collateral by the transferor to the transferee in the course of an earlier transfer of the license under which promise the transferor is obliged to transfer the license back to the transferee in the event of default in payment for property conveyed as part of the earlier transfer of the license[.]

The IRS asserts that its tax lien against the license is superior to the liens of those creditors claiming a

"hold" on the transfer pursuant to AS 04.11.360(4). The IRS bases this contention on the claim that the liquor license is "property" within the meaning of 26 U.S.C. § 6321 of the Internal Revenue Code and urges that the IRS lien should be classified as superior to the other liens asserted by the various municipal and private defendants. The court disagrees.

The IRS relies on Section 6321 which creates a federal tax lien in the amount of any unpaid tax on "[a]ll property and rights to property, whether real or personal, belonging to" the delinquent taxpayer. Where the federal government asserts a tax lien, the threshold question is whether and to what extent a taxpayer had "property and rights to property" to which the federal lien could attach. *Aquilino v. United States*, 363 U.S. 509 (1960). In determining the extent of a taxpayer's legal interest in property sought by the IRS, federal courts look to state law. *United States v. Bess*, 357 U.S. 51 (1957); *Aquilino*, 363 U.S. at 513. In determining the extent of a debtor's property interest, the court is not to look at the competing claims against the debtor, but to the nature of the debtor's property rights in the license. *In re Professional Bar Co.*, 537 F.2d 339, 340 (9th Cir. 1976).

Under Alaska law a liquor license is a property interest created entirely by state statute. AS 04.11.010, *et seq.* However, an ownership interest in a liquor license is not absolute, and in order for a liquor license to be transferred, for any reason, there must be consent of the ABC Board. AS 04.11.360. Under this scheme the holder of a liquor license possesses an interest in the license subject to the terms of the statutes which created the license and provided conditions for its transfer. *See In re Anchorage International Inn,*

Inc., 718 F.2d 1446, 1449 (9th Cir. 1983); *In re Professional Bar Co.*, 537 F.2d at 340.

The State of Alaska has reserved unto itself substantial control over the transferability of the license. While the IRS is correct in claiming that the license can be categorized as "property" because a seller may retain a security interest in the license (AS 04.11,670), or that a license does not automatically expire upon the death of the licensee (AS 04.11.030), it is undisputed that the Quintos' interest, or any other possessor of that interest, would take the license subject to subsection 360(4) whereby a license holder seeking a transfer of the license must first pay all liquor-related creditors. *In re Anchorage International Inn., Inc.*, 718 F.2d 1446 (9th Cir. 1983); *C.Y., Inc. v. Brown*, 574 P.2d 1274, 1277 (Alaska 1978).

In this instance the IRS is in a similar position. Upon purchase of the license the IRS acquired only the "rights to property" as determined by the terms of the statutes which created it. *In re Professional Bar Co.*, 537 F.2d at 340. Additionally, the IRS's property interest in the license is not absolute; the IRS can acquire or transfer its interest in the license only upon satisfaction of creditors' claims.

In *United States v. State of California*, 281 F.2d 726 (9th Cir. 1960) (hereinafter *California*), the Ninth Circuit considered a similar issue of priority between a state and federal tax lien on a liquor license. The issue before the court was the priority as between a federal tax lien and state taxes under a state statute requiring a state ABC Board to condition and refuse to transfer a liquor license when the

owner of the license was delinquent.[5] In holding that the state was permitted to retain the sum owed in preference to the IRS's claim of federal supremacy, the court stated:

> Here the license existed because the state had issued it. If licensee acquired something of value, it was because the state had bestowed it upon him. Whatever value the license, as property, may have had to a purchaser depended upon its transferability. If it was transferable, it was because the state had made it so. If the state [has] seen fit to impose conditions upon issuance or upon transfer of property it has wholly created, that is the state's prerogative so long as its demands are not arbitrary or discriminatory. The federal government has no power to command the state in this area. It has no power to direct that property be created by the state for purposes of federal seizure.

Id. at 728. *California* is still looked upon favorably in this circuit.[6]

Other Ninth Circuit cases have similarly decided this issue. *In re Farmer's Markets, Inc.*, 792 F.2d 1400 (9th Cir. 1986) (debtor's property interest impaired by state statute limiting transfer of liquor li-

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[5] The applicable California statute involved at the time corresponds to the Alaska statute in that the California ABC department could refuse to transfer any liquor license when an applicant for the license was delinquent in payment of any taxes due. *California*, 281 F.2d 726, 727.

[6] The court declines to follow the Sixth Circuit case of *In re Terwilliger's Catering Plus, Inc.*, 911 F.2d 1168 (6th Cir. 1990), *petition for cert. filed*, —— (U.S. Nov. 30, 1990) (No. 90-772).

cense until delinquent state taxes paid, deceased debtor's estate to take the license subject to restriction imposed on the debtor by transferor). *See also In re Anchorage International Inn*, 718 F.2d at 1466; *In re Professional Bar Co.*, 537 F.2d at 340.

Moreover, in *California* the Ninth Circuit determined that the imposition of conditions on the transfer of property were lawful so long as those conditions were not arbitrary or discriminatory. *California*, 281 F.2d at 728. On this issue, there is no evidence to show that the Alaska conditions upon the transfer of the subject license were in any way arbitrary or discriminatory. All holders of a liquor license are similarly bound by the rule that a sale of a liquor license will not be consummated until the debts are paid. *In re Anchorage International Inn*, 718 P.2d at 1449. Moreover, this rule encourages the extension of credit by providing that a creditor has a priority right to payment from a particular asset, namely, the liquor license. *Id.* It is the court's opinion that such a restriction is not arbitrary and capricious under *California*.

Under Alaska law, the ABC Board is the entity authorized to control sales of liquor through the issuance of licenses to the public. Any transferee, even one who takes for consideration, takes only the right to petition the ABC Board for a transfer of the license. *Queen of the North v. Legrue*, 582 P.2d 144, 149 (Alaska 1978). Due to the restrictions on transfer, the holder of a lien on a liquor license, including the United States, possesses only the right to apply to the ABC Board for a transfer of the license. Just as the Quintos could not have transferred the liquor license without payment of creditors' claims, neither may the United States.

The position of the IRS is one of an ordinary creditor who takes an interest in the license subject to the right of the ABC Board to deny a transfer of the license pending satisfaction of creditors' claims. Such a position does not warrant the imposition of injunctive relief. The United States' motion for summary judgment is hereby denied. The defendants' motions as to the validity of the competing claims against the license and as to whether the IRS is entitled to have the license transferred to Wayne are hereby granted.

Having decided the foregoing, the court now turns to the priority of the liens asserted against the sale proceeds of the license.

The general rule is that once a federal tax lien has attached to a state-created interest, federal law is to be looked to in determining the priority of competing liens asserted against a taxpayer's property or right to property. *Aquilino*, 363 U.S. at 513, 514.

In instances where a state-created lien and a federal lien are competing for priority, the well-founded principle of "first in time is first in right" applies. *United States v. New Britain*, 347 U.S. 81, 85 (1954); *In re Priest*, 712 F.2d 1326, 1327-28 (9th Cir. 1983), *modified*, 725 F.2d 477 (9th Cir. 1984). A federal tax lien arises at the time the taxes are assessed. 26 U.S.C. § 6322. However, a state-created tax lien has priority over a competing federal tax lien if the state lien is sufficiently specific and certain that it can be characterized as "choate". *New Britain*, 347 U.S. at 84; *In re Priest*, 712 F.2d at 1329. A state-created lien will be "choate" and prevail against a federal lien when it identifies the person or entity with a right of lien on the property, the property subject to the lien, and the amount due. *In re Priest*, 712 F.2d at 1328.

As to the federal lien on the license, only Juneau's lien arises prior in time to that of the IRS. Juneau recorded its lien in the Juneau Recording District on July 28, 1986. The IRS does not dispute the conclusion that the Juneau lien clearly identified Juneau as the entity with a lien on the Quintos' property, as well as the property subject to the lien and the amount due, thus satisfying the "choate" test under *New Britain*. Given that the United States' lien on the Quintos' property arose on September 29, 1986, some three months later, the court finds that Juneau's lien is superior to that of the lien asserted by the United States.

As to the remainder of the defendants' claims asserted against the sale proceeds of the IRS's license, the IRS lien is prior in time. There is no evidence to show that any of the claims had become "choate" prior to September 29, 1986. The IRS claim is therefore superior as to those asserted by the remaining defendants.[7]

The United States' motion for summary judgment claiming an interest sufficient to transfer the license is denied. The United States' motion as it relates to injunctive relief against the ABC Board and the other defendants is denied. The defendant City and Borough of Juneau's motion for summary judgment is granted, and the other defendants' motions for summary judgment are denied subject to the foregoing discussion of the rights between all parties. The clerk of court shall enter judgment dismissing plaintiff's complaint.

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[7] This point appears to be moot, as the IRS sale of the Office Lounge's liquor license generated only $20,500. Juneau claims approximately $33,000 due, while the IRS claims approximately $14,000.

Inasmuch as the court has not heard oral argument, the court will reconsider this order in accordance with Local General Rule 5(J) at the request of any party. The parties are admonished not to resubmit the same arguments.

DATED at Anchorage, Alaska, this 14 day of June, 1991.

/s/ [Illegible]
United States District Judge

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Supreme Court, U.S.
FILED
MAY 18 1994
OFFICE OF THE CLERK

No. 93-1639

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, Cross-Petitioner

v.

STATE OF ALASKA, ALASKA ALCOHOLIC BEVERAGE CONTROL BOARD, CITY & BOROUGH OF JUNEAU and ALASKA HOTEL & RESTAURANT EMPLOYEE TRUST FUNDS, Cross-Respondents

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

OPPOSITION BRIEF OF STATE OF ALASKA AND THE ALASKA HOTEL & RESTAURANT EMPLOYEE TRUST FUNDS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the IRS can create an asset for seizure by forcing the State of Alaska to transfer a liquor license in contravention of state-created conditions on transferability of the license.

2. Whether the Twenty-first Amendment to the United States Constitution precludes the IRS from enforcement of its federal tax lien by foreclosure and transfer of a state-created liquor license in contravention of the state's laws regulating liquor.

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I

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

NO. 93-1639

UNITED STATES OF AMERICA, Cross-Petitioner

v.

STATE OF ALASKA, ALASKA ALCOHOLIC BEVERAGE CONTROL BOARD, CITY & BOROUGH OF JUNEAU and ALASKA HOTEL & RESTAURANT EMPLOYEE TRUST FUNDS, Cross-Respondents

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OPPOSITION BRIEF FOR CROSS-RESPONDENTS THE ALASKA HOTEL & RESTAURANT EMPLOYEE TRUST FUNDS AND STATE OF ALASKA, ALCOHOLIC BEVERAGE CONTROL BOARD

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions described at Cross-Pet. App. at 2-3, the statutory and constitutional provisions described at Pet. App. at 23-35 are also involved in this case.

STATEMENT OF CASE

A complete statement of the facts is set forth in the order entered in this case by the United States District Court, District of Alaska. (Cross Pet. Appendix D at 11a - 13a) Petitioners/Cross-Respondents do not dispute this recitation of the facts by the lower court.

For purposes of this cross-petition, however, the following facts are pertinent. An Alaska liquor license exists and is distinguished from other types of property because it is wholly created by state statute. Only those applicants who meet the statutory requirements may hold and operate a liquor license. Alaska Stat. § 04.11.010. In creating a liquor license interest, Alaska allowed limited transferability of the license. All transfers of a liquor license must be approved by the State of Alaska Alcoholic Beverage Control Board (hereinafter "ABC Board"). Alaska Stat. § 04.11.040. The licensee only has the right to petition the ABC Board for transfer of the license. Alaska Stat. § 04.11.280. Alaska Stat. § 04.11.360 enumerates twelve conditions mandating denial of transfer of a liquor license including that "the transferor has not paid all debts or taxes arising from the conduct of the business licensed under this title" or made provision for satisfaction of those debts. Other than its use by a licensee to sell alcoholic beverages, a liquor license has value only upon transfer.

Marcello and Nancy Quinto operated a bar in Juneau, Alaska, known as the Office Lounge. The Quintos held an Alaska liquor license. In 1985 and 1986, the Quintos became delinquent in their taxes in the operation of the Office Lounge, including federal and state employment taxes and local sales and property taxes. The Quintos also

became delinquent in pension contributions owed to the Alaska Hotel and Restaurant Pension Trust Fund (hereinafter "Pension Fund") on behalf of their employees.

On July 28, 1986, Juneau recorded a notice of tax lien against the Quintos for $24,854.22. On September 29, 1986, the IRS assessed delinquent taxes against the Quintos totalling $14,389.94. 26 U.S.C. §§ 6321, 6322. On September 30, 1986, despite a specific statutory provision prohibiting foreclosure (Alaska Stat. § 04.11.670), the IRS levied upon all the Quintos' property and purportedly seized their liquor license by taking possession of the piece of paper hanging on the wall of the Office Lounge identifying the license.

On October 22, 1986, the IRS published notice of sale of the license and purchased it for $14,827.43, the amount of the Quintos' federal tax liability. The IRS did not attempt to qualify under Alaska statutes as a liquor license holder.

Over a year later in September 1987, the IRS auctioned the license to Ira Rosen and John Henry on behalf of Wayne Entertainment.[1] The IRS executed a "Certificate of Sale" to Wayne Entertainment. This certificate purportedly transferred "all right, title and interest of the United States" in the liquor license. This sale for $20,500 was accomplished despite the fact that an Alaskan bar liquor license had a far greater fair market value at that time.

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[1] Prior to the sale, the IRS made assurances to the City and Borough of Juneau that the taxes owed the municipality would be paid from the proceeds of the sale of the license. (Cross Pet. Appendix D at 13a; CR 33, Aff'd at 3; CR 39, Att. F to Aff'd at 2)

After the IRS had auctioned the liquor license, the IRS applied to the ABC Board to transfer the license to Wayne Entertainment. Pursuant to Alaska Stat. § 04.11.470, the State of Alaska, the City and Borough of Juneau, and the Pension Fund filed objections to the transfer of the liquor license. Pursuant to Alaska Stat. § 04.11.360(4), the ABC Board denied the IRS's application to transfer the liquor license to Wayne Entertainment.

The federal government initiated an action in the United States District Court for the District of Alaska to quiet title to the license free of all debts and taxes, including the taxes owed the City and Borough of Juneau and the State of Alaska.[2] (Pet. App. at 18) The federal government sought an order compelling the Alaska ABC Board to transfer the liquor license to its buyer. (Pet. App. at 5, 18)

ARGUMENT

A. Summary of Argument

The importance and substantiality of the questions presented in the decision below and the need for supervision by the United States Supreme Court are uncontested by all parties. The only areas of dispute between the parties are two. First, whether this case is a proper vehicle for resolution of the important and recurring questions and second, the precise framing of those questions for review.

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[2] The position the IRS now takes before this Court conflicts with the position it took before the district court. The IRS now asserts that the municipality would have held a lien on the license after transfer to Wayne Entertainment. This position ignores state liquor law which precludes liens and foreclosures on liquor licenses. Alaska Stat. §§ 04.11.450, 04.11.670. The municipality could only assert its tax claim at the time of transfer of the liquor license to Wayne Entertainment. Alaska Stat. § 04.11.360(4)(A).

The petition of the State of Alaska and Pension Fund frames the issue of what exact property interest exists in a state-created liquor license for attachment of a federal tax lien. Since this case frames this issue outside of and uncluttered by bankruptcy court proceedings found in other cases addressing the issue, this case is most appropriate for review of the question. Petitioners/Cross-Respondents also submit that a conflict in the circuit courts exists as to the proper analysis of what interest the federal government may obtain in a state-created liquor license upon attachment of a federal tax lien. This Court's review is needed to decide whether the "nature of the property interest" analysis (Ninth Circuit) or the "priority of claims" analysis (Sixth Circuit) is the more appropriate legal analysis in the determination of the extent of the federal government's claim.

B. The Conflict In The United States Courts Of Appeals Has Occurred Predominately In Bankruptcy Related Cases.

The federal government has identified the conflict in the United States courts of appeals. In the Ninth Circuit decisions, the court recognized that when a state creates property, the nature of the property interest created includes state requirements of satisfaction of state and local taxes before transfer. *United States v. Stone*, 6 F.3d 581 (9th Cir. 1993); *In re Kimura (United States v. Battley)*, 969 F.2d 806 (9th Cir. 1992); and *United States v. California*, 281 F.2d 726 (9th Cir. 1960). In the Sixth Circuit decision in *In re Terwilliger Catering (Bavely v. United States)*, 911 F.2d 1168 (1990), *cert. denied sub nom. Ohio Dep't of Taxation v. IRS*, 111 S. Ct. 2815 (1991), the court felt that the state requirement that state taxes be paid prior to transfer was not a component of the property interest, but a priority or debt collection scheme.

Id. at 1173. With the exception of the 1960 *California* decision, these cases creating a conflict in the circuits arose in the context of competing priority claims of creditors in the debtor/taxpayer's bankruptcy proceeding. *See also In re Anchorage Int'l Inn (Artus v. Alaska Dep't of Labor)*, 718 F.2d 1446 (9th Cir. 1983); *In re Professional Bar Co. (Sulmeyer v. California, Dep't of Employment Dev.)*, 537 F.2d 339 (9th Cir. 1976); *California v. Farmer's Market Inc.*, 792 F.2d 1400 (9th Cir. 1986).

Significantly, in the case at bar, the issue arises in the context of the IRS attempt to foreclose on the state-created liquor license and force the transfer of the state-created property interest in contravention of the statutory framework creating the license. The issue here is not embroiled in the competing claims of creditors claiming priority in bankruptcy court; the sole factual issue presented here is -- what is the nature of the property interest of the taxpayer in the state-created liquor license which the federal government seeks to attach and transfer?

In this case, the appropriateness of creating conditions of transfer as part of the property interest created is presented in stark detail. Here, it can be seen the federal government is attempting to force a transfer of property that the taxpayer/holder of the license could not attempt. If the state has the power to create a liquor license so that it could *never* be transferred, it must necessarily have the power to create reasonable and nondiscriminatory conditions of transfer that apply with equal force to the IRS. *United States v. California*, 281 F.2d at 728 ("If the state had seen fit to impose conditions upon issuance or transfer of property it has wholly created, that is the state's prerogative so long as its demands are not arbitrary or discriminatory.") This case is the most appropriate vehicle for resolution of the question conceded by the federal

government to be one of "recurring national importance."[3] (Cross-Pet. at 9)

C. The Question Presented Is Which Analysis Of The State-Created Property Interest Is Correct.

The conflict within the circuits identified by the federal government arises from two separate approaches taken by the Ninth and Sixth Circuits in the legal analysis of a wholly state-created property -- a liquor license. In both circuits, the courts have identified the threshold issue to be the determination of the nature of that property to which an IRS federal tax lien may attach. However, the Ninth Circuit views the statutorily-set conditions on transfer of the liquor license, i.e. payment of taxes, as an integral part of that property interest to which the federal tax lien attaches. The Sixth Circuit views those statutory conditions as merely a debt collection scheme which changes the priority of claims to be paid.

Petitioners/Cross-Respondents have referred to this dichotomy as the "nature of the property interest" analysis of the Ninth Circuit Court of Appeals as opposed to the "priority of claims" analysis employed by the Sixth Circuit Court of Appeals. Interestingly this dichotomy is also demonstrated quite vividly by the differing recitation of questions presented for review identified by Petitioners/ Cross-Respondents and the United States in this case:

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[3] As pointed out by the United States, there are numerous states with similar statutes. See Ariz. Rev. Stat. Ann. § 4-210(A)(5) (1989 & Supp. 1993); Cal. Bus. & Prof. Code § 24049 (West 1985); Haw. Rev. Stat. § 281-45(3) (1992); Md. Ann. Code art. 2B, § 74(a)(1) (1993); N.M. Stat. Ann. § 7-1-82(A) (1993); Pa. Stat. Ann. tit. 47, § 4-477(d)(3) (Supp. 1994); R.I. Gen. Laws § 3-5-19 (1987); S.D. Codified Laws Ann. § 35-2-7 (1992).

Petitioner/Cross-Respondent's Questions Presented	United States' Questions Presented
1. Whether the IRS can create an asset for seizure by forcing the State of Alaska to transfer a liquor license in contravention of the state-created conditions on transferability of the license.	1. Whether, by requiring state liquor licensees to pay all outstanding state and local taxes as a condition for approval of any transfer of the license, the State of Alaska may obtain priority in the distribution of the proceeds of the sale of the license over a perfected federal tax lien.
2. Whether the Twenty-first Amendment to the United States Constitution precludes the IRS from enforcement of its federal tax lien by foreclosure and transfer of the state-created liquor license in contravention of the state's laws regulating liquor.	2. Whether the sale by the Internal Revenue Service of the taxpayer's interest in a liquor license to which a federal tax lien has attached must be rescinded because state and local tax claims have not been paid in full.

(Emphasis added.)

The supervision of the this Court is needed to determine which of the approaches to the analysis of state-created liquor licenses should prevail. Under a "nature of the property" analysis, it can be seen that the IRS, when it seized the liquor license, acquired at most whatever property interest the Quintos held. The IRS was thereby subject to the same conditions of transfer as the Quintos including the need to provide for payment of all debts under Alaska statute. Under the federal government's analysis, the IRS is promoted to a higher level of property interest in the liquor license than that held by the taxpayer

because of its super-priority as a federal tax lien. The state-created conditions of transfer fall by the wayside as a contravening priority system. The states' rights under the Twenty-first Amendment to control the sale and distribution in alcohol within their borders is disregarded. In light of the inability of the United States courts of appeals to address uniformly this issue of the transferability of state-created property interests, the need for plenary review by this Court is indisputable.

Upon this Court's granting review of the initial petition, review of the United States' cross-petition is unnecessary because the federal government's questions are subsumed within Alaska and Pension Fund's petition. Petitioners/Cross-Respondents request this court to grant its petition and deny the cross-petition.

DATED this 18th day of May, 1994

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